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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 164

OLLIE B. ROBERTS,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS

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Attorneys for Petitioner,
Ollie B. Roberts.

F. NEILSON ROGERS,
Of Counsel.

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To the Honorable Supreme Court of the United States:

Now comes the Petitioner in the above numbered and entitled cause, and respectfully moves the Court to set aside the order of this Court, entered on the 9th day of October, 1950, denying Petitioner's Petition for Writ of Certiorari, and to grant him a rehearing, and to reverse said cause, and therefor says:

GROUND FOR PETITION FOR REHEARING

Since the opinion handed down by the Texas Court of Civil Appeals in this cause, the Texas Courts of Civil Appeals have adhered to the errors complained of by Peti-

tioner in other cases, to the extent that consideration of said Petition is urgently necessary to avoid confusion in the law of the State of Texas as it applies to the Federal Employers' Liability Act.

REASONS RELIED UPON FOR ALLOWANCE OF THE PETITION

Petitioner cannot believe that this Honorable Court is of the opinion that there was no evidence to support the findings made by the jury, or that the submission of negligence to the jury was such a general submission as to preclude Petitioner's recovery.

It is believed that the Court is of the opinion that this case is not of sufficient importance to warrant the attention of this Court, which is no doubt true, if this case standing alone were the sole consideration.

Texas Courts of Civil Appeals, from the date of the opinion in this case, have rendered opinions on only the following Federal Employers' Liability Act cases (excluding two appeals on Pleas of Privilege):

1. *Missouri-Kansas-Texas Railroad Co. of Texas v. Roberts, 225 S. W. 2d 198*, opinion by the Dallas Court, dated Oct. 21, 1949. (Writ of Error Ref., N. R. E.) Reversed and rendered because of no evidence to support jury's findings, and improper submission of negligence.

2. *Gulf C. & S. F. R. Co. v. Ogden, 228 S. W. 2d 569, Beaumont Court of Civil Appeals, March 16, 1950.* (Writ of Error Ref., N. R. E.) Reversed and remanded because the evidence was insufficient to support the findings of fact made by the jury.

3. *Missouri-Kansas-Texas Railroad Co. of Tex. v. Webb, 229 S. W. 2d 204, Waco Court of Civil Appeals, April 13, 1950.* (Writ of Error Ref., N. R. E.) Reversed and remanded because of grossly excessive award of damages which "* * * were and are so clearly against the overwhelming weight and preponderance of the evidence * * *."

4. *John W. Armstrong, Jr. v. Missouri-Kansas-Texas Railroad Company of Texas* (As yet unreported), *Dallas Court of Civil Appeals, October 6, 1950.* Affirmed, denying recovery awarded by jury because as a matter of law the jury's finding of negligence and causation was improper, in that the plaintiff did not seek additional help in performing the duty which caused his injury and the defendant could not have anticipated same.

Petitioner earnestly contends that in the instant case, as well as in others rendered by the Texas Courts since the date of the rendition of this opinion, the Texas Courts of Civil Appeals, unchecked by the Supreme Court of Texas, have by their holdings in the above cases definitely departed from and violated the provisions of the Federal Employers' Liability Act and the decisions of this Court interpreting the same. Thus, an independent and conflicting trend of authority has been established, invading the province of the jury to such an extent that the foundation of our jury system in the State of Texas has been seriously impaired, contrary to the mandates of this Court, actually depriving employees of this class of rights conferred upon them by the Act.

If the instant case becomes authority in this State and elsewhere, supported by denial of application for writ of

certiorari, a most serious conflict in law will necessarily result. For, in the State Courts Federal rights can be destroyed by merely changing the current form and requirement for submission by special issues; while such technical reasons, if applied at all, could only reverse and remand the cause in the Federal Courts. And in the State Courts Federal rights can be destroyed by review of the evidence without regard for the Federal rules established for such review; while in the Federal Courts, these Federal rights would be properly protected.

Petitioner earnestly believes that the greatest advancement in the field of jurisprudence in our day has been the attempt made by the Supreme Court of the United States to restore the jury to its original function in the trial of cases.

For many years, with the development of our case law, particularly in the State Courts, with each successive relevant opinion handed down, the sphere of the jury in the trial of cases has been gradually restricted: as to what it may consider, as to how it may consider what it gets, *and having considered, whether it arrived at the correct result.* And down through the years the power and function of the jury has lessened, while the power and function of the Appellate Courts has become enlarged, because there was no tribunal to champion the cause of the jury, and the Appellate Courts were final in determining its rights.

A great part of what has been accomplished will be lost beyond recall if the opinion of the Dallas Court of Civil

Appeals is given approval by the Court which has been the champion of the restoration of jury function.

This Court may rightfully feel that it has often written upon this question, and tire of applications for relief which come before it from its many jurisdictions, each with many complications caused by separate procedural rules. However, power once gained by an Appellate Court, to adjudge the rights of litigants by invasion of the fact finding sphere of the jury, will be all the more begrudged upon surrender the longer it is allowed to exist.

It certainly is not the desire and intention of this Court to have within its jurisdiction one set of Courts which, under a given fact situation, will permit a claimant to recover for his injury; and another set of Courts which, under the same fact situation, denies recovery.

Petitioner pled, by trial amendment (authorized by Texas Rule of Civil Procedure No. 66), that he sustained injury, which was negligently caused by the method adopted by his employer for the performance of his work, which exposed him to the hazard which caused his injury.

The State Courts of Texas, as well as other jurisdictions, had theretofore held that the adoption of a negligent method proximately causing personal injury constituted actionable negligence upon which recovery could be had.

The case was brought under the Federal Employers' Liability Act, and the evidence was uncontradicted to the effect that the method which Petitioner used had been

adopted by Respondent; that another entirely different method existed for performing the same work; that Petitioner sustained serious injury. The trial jury found that Respondent was guilty of negligence which proximately caused the injury in question, in adopting the method which it did adopt.

The Texas Court of Civil Appeals rendered the cause against Petitioner, holding:

First: That the Trial Court's submission by Special Issues of negligent method of performing work constituted a general submission.

Second: That there was no evidence to support the findings of the jury.

The opinion of the Court of Civil Appeals in this case has decided a Federal question in a way probably not in accord with applicable decisions of this Court, as set out in Petitioner's Petition for Writ of Certiorari heretofore filed herein.

WHEREFORE, premises considered, Petitioner prays that this Court set aside the order entered on the 9th day of October, 1950, denying Petitioner's Petition for Writ of Certiorari, and that it grant him a rehearing; that his Petition for Writ of Certiorari be granted, and that upon hearing the judgment of the Court of Civil Appeals be reversed, that the judgment of the Trial Court be reformed, and as reformed affirmed, awarding Petitioner damages in the sum of $13,371.71.

He prays further for all other relief, general and special, to which he may be in law and in equity entitled.

Respectfully submitted,

WEBB & ROGERS,
Grayson County State
Bank Building,
Sherman, Texas.

By: F. Neilson Rogers
Attorneys for Petitioner,
Ollie B. Roberts.

I, F. Neilson Rogers, attorney for Petitioner, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to the ground above specified.

F. Neilson Rogers
F. NEILSON ROGERS,
Attorney for Petitioner.